F. M. S. REPORTS.

[APPELLATE CRIMINAL JURISDICTION]
HOWES, J.

May 27, 1940.

BANTA SINGH vs. PUBLIC PROSECUTOR.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 60 of 1940]

Penal Code (Cap. 45), section 411—Minor Offences Enactment (Cap. 46), section 35 (i)—Misjoinder of charges.

The appellant was charged with, and convicted of dishonestly receiving stolen property under section 411 of the Penal Code. He was charged alternatively with having in his possession property reasonably suspected of having been stolen under section 35 (1) of the Minor Offences Enactment.

Held, that the latter charge cannot be tried as an alternative to the former, as the onus under the two charges is different, and evidence, admissible under the latter charge, is not admissible under the former.

CRIMINAL APPEAL.

Appellant in person.

T. V. A. Brodie, Deputy Public Prosecutor, for respondent.

Howes, J.—In this appeal the appellant was charged with, and convicted of dishonestly receiving stolen property, namely timber and sheet roofing valued at $60—$80, under section 411 of the Penal Code (Cap. 45).

Alternatively, he was charged with having in his possession on the 12th March, timber and sheet roofing, which was reasonably suspected to be stolen property, and having failed to give a satisfactory account of the same; an offence punishable under section 35 (i) of the Minor Offences Enactment (Cap. 46).

The appellant appeared in person, and his grounds of appeal were (1) that the conviction was against the weight of evidence, and (2) that the sentence (6 months R.I.) was excessive.

As a preliminary, I am not satisfied that a charge under section 35 (i) of the Minor Offences Enactment can be tried as an alternative charge to one under section 411 of the Penal Code.

Under section 35 (i) of the Minor Offences Enactment, once a person is found in possession of anything reasonably suspected of being stolen, the onus is on him to account satisfactorily how he came by the same; and evidence of what such person said to the Police, is admissible in a charge under section 35 (i) of the Minor Offences Enactment, but is not admissible to prove an offence under section 411 of the Penal Code.

Under section 411, the onus is on the prosecution throughout to prove (1) that the property in question was stolen property; (2) that the accused received or retained the property; (3) that he did so dishonestly; and (4) that he knew or had reason to believe that the property was stolen property. This, however, is subject to the presumption contained in section 114 (*a*) of the Evidence Enactment (Cap. 10) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession.

Moreover, in order to convict under section 411, the Court must be satisfied that the property was stolen by some other person, to the knowledge of the accused; and there should be some evidence to show that such was the case.

In the present case, the appellant was employed by the complainant, who is a building contractor, as a watchman, and was in charge of the place in which a quantity of left-over building material was stored.

On the 15th March, some picture-rails, which the complainant was able to identify as his property, and which had been stored at the place at which the appellant was employed to watch, and also some other timber and galvanised iron roofing which, although the complainant could not identify these, were similar to some which had been stored at the same place, were found to be incorporated in the structure of the house of the appellant.

The appellant's explanation was that on January 3rd, he asked Hoh Sam (a carpenter employed by the complainant) for some timber to make a charpoy, and he gave him "4 rafters like Ex. 1 (the picture-rail) and one of those big pieces of timber", pointing to a length of timber in Court. Hoh Sam in cross-examination had denied that the appellant asked for any timber, and the Magistrate accepted his denial as true.

I think the evidence, certainly as regards the picture-rails, showed that these were stolen by the appellant. There was no evidence that these or the other materials were stolen by any other person, and consequently there was no evidence to support the conviction under section 411.

The misjoinder of the alternative charge, did not as it happened, involve any injustice to the appellant; and the Magistrate could, under section 167 of the Criminal Procedure Code, have convicted the appellant of theft by a servant, although he was not charged with that offence.

I alter the conviction on the substantive charge to one of theft by a servant, section 381 of the Penal Code, and maintain the sentence, which having regard to the purpose for which the appellant was employed, and the fact that he had been twice previously convicted for offences against property, cannot be regarded as excessive.

Appeal dismissed.

[ORIGINAL CIVIL JURISDICTION]

HOWES, J.

May 17, 1940.

S. T. M. R. VEERAPPA CHETTIAR & 5 ORS.

vs.

V. R. M. L. R. M. LETCHUMANAN CHETTIAR & 5 ORS.

[PERAK CIVIL SUIT No. 178 of 1935]

Civil Procedure Code (Cap. 7), sections 212 and 213—Cross-examination upon affidavit.

Application for leave to institute a suit against a receiver.

A notice, signed by the Registrar and sealed with the seal of the Court, issued at the instance of the receiver, required the applicant to attend before the Court for the purpose of being cross-examined on his affidavit at the hearing of the application.,

The applicant failed to attend and it was contended that his affidavit could not, therefore, be read.

Held, that under sections 212 and 213 of the Civil Procedure Code an order of Court is essential before a party need attend for cross-examination.

Case referred to:—

(1) *Bottomley In re Brougham* 84 L.J.K.B. 1020.

SUMMONS.

Hum Yam Teh for plaintiffs.
S. M. Sharma for receiver.

Howes, J.—In this summons (as amended at the hearing before Murray-Aynsley, J., on the 18th March, 1940, by *Mr. Ong*, counsel for the applicant, by the withdrawal of the first portion thereof; such withdrawal being confirmed by *Mr. Teh* at the hearing before me in Court on the 1st May, 1940), the applicant V.R.M.L.R.M. Letchumanan Chettiar applies for leave to institute against Leonard James Peace as Receiver and Manager, a suit for the recovery from him as such Receiver and Manager, of the property belonging to the partnership business of "L.R.M. and L.N." (hereinafter referred to as the "old firm") the decretal amount in Suit No. 92 of 1937.

In support of the summons, the applicant filed an affidavit, sworn on the 29th February, 1940 (178). In this he seeks to show that the decretal amount of $3,520 interest and costs recovered against him and the 4th defendant, L.R.M. Muthukaruppan Chettiar, jointly as partners in the firm of L.R.M., by one Ramasamy, in Ipoh C. S. 92 of 1937, on a promissory note made by their agent, L.R.M. Subramaniam Chettiar (now deceased) in favour of Ramasamy, was in fact a debt of the "old" L.R.M. firm of which Mr. Peace is Receiver and Manager.

The applicant now applies for leave to institute a suit against the receiver to recover this amount; or (his counsel now says) to be indemnified by him against the applicant's personal liability for this debt.

At the first hearing of the summons by Murray-Aynsley, J., on the 18th March, 1940, it was adjourned into Court. The applicant took no steps to obtain a hearing date until the 10th April, 1940, when his solicitors wrote a letter (188) to the Registrar, and as the result the hearing was fixed for the 1st May, 1940. Meanwhile, on the 6th April, the applicant had sailed for India, and is still out of the jurisdiction. On the 15th April, 1940, *Mr. Sharma* solicitor for the receiver also wrote to the Registrar, asking for an early date to be fixed.

On the 24th April, 1940, *Mr. Sharma* through the Court sent a notice (195) of his intention to cross-examine the applicant on his affidavit of the 29th February, 1940. This notice, signed by the Registrar and sealed with the seal of the Court, required the applicant to attend before the Court on the 1st May, 1940, for this purpose.

In consequence of the failure of the applicant to attend, *Mr. Sharma* contended that, following the practice under Order XXXVIII, rule 28, of the English Rules, the affidavit of the applicant cannot be read. *Bottomley in re Brougham*[1].

Mr. Teh objected that although under English practice, a notice by one party requiring the other party to attend for cross-examination is all that is necessary;